WHICH COURT?

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In railroad cases, perhaps more than in any other single branch of civil litigation, the choice of the court represents a special problem requiring and receiving from the astute practitioner sound analysis and intelligent consideration.

THE STATUTORY MANDATE

The venue provision of the Federal Employers' Liability Act[1] permits the plaintiff to bring his action in the district court of the United States, in the district where the defendant resides, or in which the cause of action arose, or in which the defendant is doing business at the time of commencing such action. This jurisdiction is concurrent with that of the State courts.

One of the mandates for attorneys representing injured plaintiffs to capitalize on this broad choice of venue came from the late Mr. Justice Jackson, when he said:[2]

> "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner. There is nothing to restrain use of that privilege, as all choices of tribunal are commonly used by all plaintiffs to get away from judges who are considered to be unsympathetic, and to get before those who are considered more favorable; to get away from juries thought to be small-minded in the matter of verdicts, and to get to those thought to be generous; to escape courts whose procedures are burdensome to the plaintiff, and to seek out courts whose procedures make the going easy."

For a number of years prior to the amendment of the Judicial Code in 1948 attorneys representing injured railroad employees utilized the choice of venue as a valid, powerful weapon, selecting for their venue those jurisdictions in the large metropolitan areas where the dangers of a penurious jury's verdict were least likely to occur. In the years prior to 1948 the usual problem on venue in a Federal Employers' Liability Act cast was whether o rnot the railroad was doing business in the district which

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1 *45 U.S.C. 56:* "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

2 Miles v. Illinois Central R.R. Co., 315 U.S. 698, 706.

the plaintiff had selected. During those years several determinations were made which may at some future date again have application but which, in the light of later statutory enactments, must be regarded not because of any present practical import but as historical phenomena.

The Texas & Pacific Ry. Co., with lines only in the southwestern United States, was held to be doing business in the Southern District of New York and an action was maintained by an employee injured in Texas where the evidence showed a continuous and regular solicitation of freight and passenger business in the Southern District of New York and the maintenance of certain stock facilities in that jurisdiction.[3]

Mrs. Pickthall was able to bring suit in New York for the wrongful death of her brakeman husband against the Butte, Anaconda & Pacific Ry. Co., with no lines west of Montana and which solicited no business in New York, but which had its Board of Directors meetings in New York City.[4]

The Discretionary Restriction

Superimposed upon the broad latitude granted injured railroad workers with respect to the choice of venue in the Federal Court is 28 U.S.C. 1404(a), which provides as follows:

> "For the convenience of parties and witnesses, and in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The Supreme Court has held that actions brought under the Federal Employers' Liability Act are subject to the discretion given the Court.[5]

For several years the majority of the District Judges were of the view that Section 1404(a) was a statutory enactment of the doctrine of *forum non conveniens* and that therefore the plaintiff's choice was entitled to considerable weight. The defendant was required to unequivocally and definitely show a strong and clear case of convenience to warrant the transfer.[6] However in *Norwood v. Kirkpatrick*,[7] the Supreme Court, by a divided court, made it clear that 1404(a) had introduced into our jurisprudence a species of discretion with respect to transfer which was strictly of statutory origin, and in that case the Supreme Court permitted an order transferring a Federal Employers' Liability Act case from Pennsylvania, where the plaintiff resided and where all of the medical witnesses resided, to South Carolina, where the accident had occurred and where witnesses with respect to liability were alleged to be more readily available. Under the doctrine of *forum non conveniens*, of

[3] Kilpatrick v. Texas & Pacific Ry. Co., 166 F. 2d 788, C.A. N.Y. 1948, cert. den. 335 U.S. 814. To same effect see: Nunn v. Chicago, Milwaukee, St. Paul & Pacific R R. Co., 71 F. Supp. 541; Butts v. Southern Pacific Co., 69 F. Supp. 895.

[4] Pickthall v. Butte, Anaconda & Pacific Ry. Co., 73 F. Supp. 694.

[5] Ex Parte Collet, 337 U.S. 55, and Kilpatrick v. Texas & Pacific Ry. Co., 337 U.S. 75.

[6] Skultety v. Pennsylvania R. Co., 91 F. Supp. 118.

[7] Norwood v. Kirkpatrick, 349 U. S. 29.

course, the plaintiff's choice of his own residence as the venue would have controlled.

It would now appear, therefore, that if venue is selected by plaintiff's counsel in a forum other than that in which the accident occurred, the plaintiff's counsel must be prepared to try two lawsuits, and that he must marshall for his first lawsuit on the balances of conveniences, all of the equities which may possibly affect the discretion and judgment of the Judge. Considerations which have reportedly influenced trial judges in granting or denying motions for transfer under Section 1404(a) include the following:

(a) Place of residence of the plaintiff;
(b) The location of the defendant's claim office which served as the center of operations for conducting the investigation;
(c) The location of defendant's main office;
(d) The convenience of witnesses:
    (1) whether or not these witnesses can be brought to the forum without cost to the defendant over its lines;
    (2) whether or not the testimony of such witness is critically relevant;
    (3) whether or not the testimony of such witness is in sharp dispute;
    (4) where the extent of damages is a major factor, the location of the treating doctors and hospitals and their convenience as opposed to the location of examining experts.
(e) The level of jury verdicts in the proposed transferee district;
(f) The docket conditions in the proposed transferee circuit.

It will be readily seen that the marshalling of the evidentiary material necessary to try this preliminary issue may call for thorough investigation and the utilization of discovery procedures, including interrogatories, the discovery of statements, photographs, medical reports, hospital records and depositions of witnesses.

While the winning of such a motion may necessarily entail a great deal of effort on the part of counsel, the stakes oft-times fully justify the energy and acumen required because of the tremendous discrepancy in the level of jury verdicts between the venue selected and the proposed transferee district.

State Courts

Up to this point we have only been considering actions commenced in the Federal Court. It will be recalled that the State courts are given concurrent jurisdiction. Once an action under the Federal Employers' Liability Act is commenced in the State court it may not be removed to the District Court even though there be diversity. The prohibition against such removal was originally contained in 45 U.S.C. 56. It is

now found in 28 U.S.C. 1445,[8] and is frequently overlooked.

Since the plaintiff has a choice between bringing his action in the State or Federal court, it is important that this choice be based on a mature consideration of a number of factors.

WHICH COURT-STATE OR FEDERAL?

ATTORNEY'S CHECK LIST

1. Will the preparation of this case require the utilization of the discovery rules contained in the Federal Rules of Civil Procedure? Can an equally good job of preparation be done under the State procedures?

In the Federal Court, under Rules 33-36, the plaintiff is permitted a veritable fishing expedition in order to obtain statements and photographs and quiz prospective witnesses. In many States examinations before trial are restricted to parties. On the other hand, in some States parties may be examined by their employees and such depositions, or any parts thereof, can be used to prove the plaintiff's prima facie case, whereas in the Federal Court, under Rule 36, only the deposition of an officer or managing agent can be so used.

2. What is the condition of the dockets? How long a wait will there be if the action is filed in the Federal Court as opposed to the State Court?

3. Is a unanimous verdict required in the State Court, as it is in the Federal Court?

A unanimous verdict is required in the Federal Court. This means that the defendant only has to convince one juror in order to cost the plaintiff either his verdict or a substantial portion thereof. In some States a plaintiff may get a verdict by the concurrence of 9 jurors, and in others by 10, and in those States, of course, the defendant would have to convince either 4 or 3 jurors, as the case may be, in order to have the same impact on the amount of the verdict.

4. Are the methods of selecting jurors the same in the State Court as in the Federal Court?

The experienced lawyer practicing in a given community becomes aware of differences between the caliber of juries selected in State and Federal courts. This is usually by reason of the system whereby these jurors are selected. Generally speaking, the observation may be made that the jurors in the Federal courts, because of the Jury Commissioner system employed in the Federal system, tend to be somewhat more of the "blue ribbon" variety than those of the usual State court. Whether this is good or bad for the plaintiff in an individual case depends, of course, upon a knowledge of the facts and personalities involved and enters so deeply into the realm of speculation that it would be folly to do more than suggest that there is room here for knowledge and the exercise of judgment.

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[8] 28 *U.S.C. 1445:* "Carriers; Non-Removable Actions. (a) A civil action in any state court against a railroad or its receivers or trustees, arising under Sections 51-60 of Title 45, may not be removed to any district court of the United States".

5. What is the personality of the Judge or Judges who might try the case or pass upon it in the Appellate Court?

This too is a most involved problem, and one which can only be accurately analyzed and answered by the seasoned practitioner. In time attorneys become familiar with the habits and the philosophy of trial judges. There is a wide variance in the way particular judges conduct procedures in the courtroom, in the degree of latitude which they permit counsel, the manner in which they charge, their attitudes with respect to the admissibility of demonstrative evidence, their attitudes with respect to the use of blackboards, and their philosophy on the sanctity of the jury verdict as compared with their own personal judgment, even though the trial is being conducted free from appeals to passion or sympathy. Intertwined with these considerations are the attitudes of the Appellate Courts, particularly with respect to the question of damages in heavy personal injury cases. These attitudes run a wide gamut from jurisdiction to jurisdiction. It is well known amongst trial men, for example, that certain Appellate Courts are notorious for ordering remittiturs. In the Federal system, on the other hand, the very constitutional power of the jurisdiction of the Court of Appeals to review the denial by the trial court of the motion for a new trial on the ground that the verdict is excessive, was challenged in *Neese v. Southern Railway Co.*[9] In this significant case, while the Court refused to decide the constitutional question, it did hold that it was error for the Court of Appeals to regard the denial of the new trial upon a remittitur of part of the verdict as an abuse of discretion, finding as it did that there was some support in the record for the action of the trial judge. The practical import of this decision is that it would appear that the Court of Appeals in the Federal system should not be expected to order a remittitur on damages after a District Judge has conscientiously refused to do so. This may very well be a determining factor in a heavy damage case on choosing between the State and Federal court.

6. What will happen if venue is improper?

In the Federal Court, we have already observed that venue may be changed pursuant to 28 U.S.C. 1404(a). The Supreme Court has made it clear in *Missouri v. Mayfield*[10] that the individual State courts may dismiss an action under the Federal Employers' Liability Act on the grounds of *forum non conveniens*, providing (a) that the doctrine has been adopted in general litigation in the particular State involved, and (b) that there is no discrimination as between citizens and non-citizens in the application of the doctrine. Before a suit is commenced on behalf of a non-resident in the State court it is therefore essential that this question be briefed and analyzed for the particular State involved. The risks of being wrong are very grave and in cases of doubt the safe practice is for the attorney to maintain

[9] Neese v. Southern Ry. Co., 76 S. Ct. 131, reversing 216 F. (2d) 772.

[10] Missouri v. Mayfield, 71 S. Ct. 1.

suits simultaneously both in the State and in the appropriate Federal court, dismissing the latter after the jurisdictional and venue problems have been resolved in the State court action. Of course, there must also be considered individual State court rules which provide for changes of venue within the State for the convenience of witnesses.

Conclusion

From this demonstration of the various considerations which are involved in the choice of a court for the bringing of an action under the Federal Employers' Liability Act, it must be painfully apparent that the problem is an extreme complex and that even at this initial step in the handling of a lawsuit for a seriously injured railroad worker there is a genuine need for competent and experienced counsel. Indeed, the problems of law and the evidentiary problems involved in successfully representing an injured railroad worker are often relatively easy in comparison with the problem just considered. This is an unfortunate development for the injured railroad worker and accounts in part for the inordinate disparity of results obtained both in settlement and trail for comparable injuries.